No. 16,491

United States Court of Appeals

For the Ninth Circuit

S. B. HUFFMAN, Trustee of the Estate of Newcomb Interests, Inc., a corporation, doing business as Casa Del Rey Hotel, Bankrupt,

Appellant,

vs.

HARRY A. FARROS,

Appellee.

APPELLANT'S CLOSING BRIEF.

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SUMMARY OF APPELLANT'S POSITION.

Appellant's position will be more fully stated hereinafter in connection with his reply to specific points advanced by Appellee.

The major premise of Appellant is that the liquor license in question is property which passed to the Appellant Trustee in Bankruptcy and is property subject to a creditor's claim of lien.

After reading Appellee's brief, we have no hesitation to state that it represents a substantial exposition of various principles of law. However, as we will hereinafter point out, we do not believe that the interpretation of the law therein set forth is applicable in the case at bar.

COMMENT ON APPELLEE'S POINTS.

In support of his argument that the lease agreement under which the license was transferred from Appellee to the bankrupt is not affected by the passage of Section 7.3 of the Alcoholic Beverage Control Act, Appellee cites various state court cases (at pages 5 and 6 of his Brief), to-wit, *Cavalli v. Macaire,* 159 CA 2d 714, 324 P 2d 336; *Tognoli v. Taroli,* 127 CA 2d 426, 273 P 2d 914; *Pehau v. Stewart,* 112 CA 2d 90, 245 P 2d 692; *Etchart v. Pyles,* 106 CA 2d 549, 553, 554, 235 P 2d 427; *Campbell v. Bauer,* 104 CA 2d 740, 232 P 2d 590; *Saso v. Furtado,* 104 CA 2d 759, 769, 232 P 2d 583, 589. The basic holding of these cases is that Section 7.3 of the Alcoholic Beverage Control Act has no retroactive effect *as between the parties to the transaction* and go off on the point that "defendants have shown no equities, and, in our opinion, it would be unjust enrichment to hold that they were entitled to retain the license." *Cavalli v. Macaire, supra,* 324 P 2d 339. We find nothing in these cases involving liquor licenses to support the involuntary trust theory advanced by the District Judge, and by Appellee. We will hereinafter, as we did in our Opening Brief, show the equities which exist in favor of Appellant herein.

Appellee, in his brief, pages 30-31, apparently takes the position that Appellant does not question the holding of the District Judge that the retention of the license after the termination of the lease was wrongful and that an involuntary or restrictive trust was created, cites Appellant's Concise Statement of Points Urged on Appeal 1(b) (T.R. p. 62), and quotes said

Specification on page 31. We are at a loss to understand how we could more clearly express our position than to therein state that such holding *"is erroneous and contrary to law"*.

It is Appellee's contention that no creditor of the bankrupt lessee could claim that he was without notice of Appellant's claim of ownership to the license by reason of the recordation of the lease agreement with the County Recorder of Santa Cruz County. In support of this position, Appellee cites (in part, at page 21), California Civil Code Section 1213, and we recite the same provision italicizing portions thereof so that the purpose of the recordation of the lease will be clear to the Court.

> "Every *conveyance of real property* acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees; . . ."

The lease here was recorded because of its effect on *real property* and has no relation to the question of the transfer of the liquor license. We repeat (as we stated on page 9 of our Opening Brief) that the provisions of the Alcoholic Beverage Control Act are the sole guide for persons doing business with a licensee and no constructive notice is imparted as to this transaction by the recordation of the lease. On page 19 of Appellee's Brief, is a paragraph taken from 25 Cal. Jur. 222, Section 90, as to the effect of knowledge by a person acquiring property that the transferor had

merely legal title, equitable ownership being in a third person, but here the creditors of the bankrupt had no knowledge, actual or constructive, of the terms of the lease since the bankrupt was the named licensee.

On page 24 of his Brief, Appellee states that no creditor did or could extend credit to the bankrupt because it had been ousted from the premises on September 30, 1954, and goes on to state that the facts to be considered by the Court were stipulated to and no assumed facts such as a creditor "inquiring of the State Board" can be considered, and further that Appellee did not permit the bankrupt to exercise dominion over the license. It appears to us that this position begs the very question before the Court.

We would here point out simply that on the date of the filing of the petition in bankruptcy herein (June 1, 1955) the license still stood in the name of the bankrupt with the knowledge and consent of Appellee, although the bankrupt had been in default for a period of eight months prior thereto, even after termination of the lease. There we have an equity in favor of Appellant Trustee not present in the State Court cases above referred to.

England v. Nyhan, (9th Cir.) 141 Fed. 2d 311, was cited in Appellant's Opening Brief at page 7 for the point therein set forth that at the time of the filing of the petition in bankruptcy the permit to operate the taxicab was in the name of the bankrupt and by the provisions of the law he was the only person able to operate under and to transfer a permit. We believe the analogy between that taxicab license and this

liquor license should answer the query of Appellee on page 25 of his Brief.

On pages 27 and 28 of his Brief, Appellee points out that the license had been sold and that this controversy is over the proceeds of the sale and that therefore it is too late for the Appellant Trustee to contend that the Appellee "had not obtained the approval of the Board to a transfer to him of the license . . . and has not paid the transfer fee." We submit that the license was sold by stipulation (T.R. pp. 13-14) between Appellee and Appellant without changing the actual facts. Certainly Appellee cannot state that the license was sold prior to bankruptcy, which is the basis for Appellant's position as set forth in his Opening Brief on page 9, a portion of which is set forth in the above quotation.

On pages 43 and 44 of his Brief, Appellee cites *Williams v. Levy,* 1931 (9th Cir.) 54 Fed. 2d 18, and on page 44 sets forth his contention that this case is quite applicable to the instant case with which point we are in agreement. In the portion quoted on pages 43 and 44, and particularly the italicized portions thereof and by applying this principle of law, to-wit, that where there are no innocent transferees *and the beneficial owner has not knowingly permitted the legal owner to obtain credit by representing himself to be the true owner,* such property is not subject to sale as property of the bankrupt estate, we find here that the license was put in the name of the bankrupt so that he could operate as the licensee and obtain credit since without the license he could not operate and pay

the rent to Appellee or obtain credit under the provisions of the Alcoholic Beverage Control Act, and the Appellant (alleged beneficial owner) here has clearly permitted the bankrupt (legal owner) to obtain credit by representing itself to be the actual owner of the license.

We would here reiterate our argument set forth on pages 5-10 of Appellant's Opening Brief that the liquor license is property which passed to the Appellant Trustee in Bankruptcy. (See Section 70a(5), Bankruptcy Act, 11 U.S.C.A. 110a(5), cited on page 10 of Appellant's Opening Brief.)

Our point that the liquor license is property subject to a creditor's claim contrary to the opinion of the District Judge, is covered by our argument on this point, pages 10-12 of Appellant's Opening Brief, and by "Appendix A" of said Opening Brief.

In support of Appellant's position that the liquor license could have been levied upon, we would call the Court's attention to the amendment to Section 688 of the Code of Civil Procedure of California passed by the Legislature in its 1959 session whereby a license issued by the State of California to engage in any business or activity was specifically made exempt from levy or sale on execution. See the discussion of this amendment in 34 *Journal of the State Bar of California* 5, at page 642, wherein it is pointed out that the seizure, removal and execution sale of State issued business and professional licenses often frustrated administration of the liquor laws, this being the main reason for the amendment above referred to. Appar-

ently the California Legislature as well as the Appellant here considered a liquor license as subject to the claims of creditors.

CONCLUSION.

In view of the facts and law hereinabove set forth, it is Appellant's contention that the "non-retroactive effect" of the provisions of Section 7.3 of the Alcoholic Beverage Control Act (as between the parties to an agreement to transfer a license), do not apply to Appellant; that the creditors of the bankrupt could have obtained a lien on the liquor license and that the liquor license is, therefore, properly an asset of the bankruptcy estate, and that Appellee cannot reclaim same, and that the Memorandum and Order of the District Judge here complained of, should be, by this Court, reversed and remanded with instructions to the District Court to make and enter an Order in said bankruptcy proceedings affirming the Referee's Order of November 2, 1956.

Dated, Burlingame, California,
November 23, 1959.

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